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Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020

This submission responds to the 3 December 2020 invitation by the Senate Legal & Constitutional Affairs Legislation Committee to contribute to the inquiry into the *Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020* (Cth).

Summary

Misuse of power by members of the Australian judiciary, in particular sexual harassment, is deeply abhorrent and contrary to the privileged position held by judges. It is particularly repugnant given the awareness of law and commitment to ethical codes that judges and magistrates share with members of the legal profession and law academics.

It requires strong condemnation by individuals and institutions that regrettably continue to accept bullying and other abuse of differentials in power. That acceptance is evident among the legal profession, in academia and in Australian legislatures.

The Bill is, however, an ineffective response, in contrast to established remedies for harms. It should **not** be endorsed by the Committee.

The following pages highlight specific concerns regarding the basis and construction of the Bill. They also comment on an alternative response.

Basis

The submission reflects research and teaching regarding ethics, harassment, regulation of the legal profession and the Constitution.

The submission does not represent what would be reasonably construed as a conflict of interest.

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Parliamentary Inquiry into Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020 (Cth)

Misuse of power by members of the Australian judiciary, in particular sexual harassment, is deeply abhorrent and deserving of strong condemnation by the Australian community. As noted above, it is contrary to the privileged position held by judges. It is especially repugnant given commitment by the judiciary to ethical codes and awareness on the part of all legal practitioners through their education and work experience.

The Bill however represents a misplaced response to misconduct on the part of Federal judges and is unlikely to be effective in preventing harms. As such should not be endorsed by the Senate Legal and Constitutional Affairs Committee.

Australian law conventionally addresses 'serious misconduct' through criminal and tort law. It is not necessary to enshrine a new and ineffective mechanism in the form of removal by the legislature of judicial pensions on an instance by instance basis.

Given the comments below it is fundamentally important to maintain a clear separation between the judicial, executive and legislative arms of the Australian government, particularly where MPs typically vote on party lines and there is a blurring between the Executive and the legislature. Overt ministerial disregard of judicial independence is increasingly evident in judgments such as *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 394.

Undue Expansiveness

As it stands, the Bill is unduly expansive.

Uncertainty

Reference to 'serious misconduct' is vague. It is accordingly likely to prove contentious as the basis for resolutions by both chambers of the national legislature. It provides a disquieting model for the unicameral legislatures, ie Queensland, Northern Territory and Australian Capital Territory.

The wording provides less certainty than reference in the *Governor-General Amendment (Cessation of Allowances in the Public Interest) Bill 2019* (Cth) to –

inappropriate, improper, wrong or unlawful conduct [including] corruption, sexual misconduct, sexual harassment, theft, fraud and other criminal behaviour.

The Governor-General Bill does not provide a persuasive model. As noted below, existing tort and criminal law provides a remedy for harms without the problems associated with the current Bill.

Inadequate Evidential Threshold

The Bill is also unduly expansive because it does not require a conviction, ie a finding of guilt in a court of law where claims are tested. It has a low evidential threshold. It does not require an independent investigation by a general integrity agency. It does not require a finding by a discrete judicial integrity commission.

More should be required as the basis of such a far-reaching measure. The Bill goes significantly beyond existing accepted remedies under tort and criminal law.

Deterrence?

One function of the Bill is presumably deterrence, ie an expectation that judges (and by extension solicitors and barristers who might become judges) will refrain from 'serious misconduct' on the basis that when the individual's judicial career ends – on retirement or through removal from the Bench – there will be no pension.

Research on elites, in particular the thinking of executives engaged in white collar crime, suggests that the potential loss of a pension is an ineffective deterrent. The Bill if passed will be noted by the legal profession but will not determine the action of judges and people who might be appointed as judges.

For many senior members of the judiciary the removal of the pension might be inconvenient but not fundamental, given that many accept a drop in income on appointment (eg judicial salaries are lower than those of leading SCs/QCs) and have already provided for their old age. It is unlikely that offenders will engage in a calculation that a spontaneous or considered act of serious misconduct has a dollar value in terms of loss of pension or in terms of compensation to a victim under tort law. They will not, to be crude, see dollar signs flash in front of their eyes as they decide to make an egregious comment or proceed to engage in reprehensible physical contact.

Judges and leading legal practitioners – just like corporate executives – are instead more likely to be concerned with shaming. No more dinners with peers at the Melbourne Club or invitations to drinks at Government House. No more high profile consultancies or requests to chair a royal commission. Grimaces on the part of their neighbours. Sorrow on the part of their friends and families. The inconvenience of being jostled by camera crew after a lifetime of deference and other privilege. Snickers on the part of law students rather than the accustomed adulation at academic events.

Implementation

The Bill is a rough and ready mechanism.

As drafted it appears simply to require a majority of members in both chambers (or in the sole chamber in a unicameral jurisdiction) to vote in favour of a resolution. That resolution might gain the necessary 'numbers' on the basis of party discipline or might instead fail on the basis of party discipline.

It might be open to condemnation by the community at large, by the legal profession and by journalists as a political exercise – unsurprising given the Bill's vagueness and the potential for action on the basis of partisanship.

Implementation under the Act might be contested under the Constitution: an interference with the judiciary in the absence of a conviction based on testing of evidence.

Necessity?

The basis of the Bill is unclear. Presumably it is meant to provide punishment and deterrence beyond the existing remedies, alongside indicating that there has been a wrong. It is not necessary.

I have referred above to tort and criminal law. The notion of 'serious misconduct' is well established in criminal law at the state, territory and Commonwealth levels. That law provides for investigation. It provides for substantial penalties where an alleged offender has been

found guilty of one or more offences and where there has been consideration by a court of any circumstances that might be taken into account, for example disability through substance abuse, dementia or other health status. The law provides for testing of claims. It also provides for appeal against findings made by a court. Criminal behaviour is best addressed through criminal law rather than through resolutions in two chambers of the national legislature.

Tort law provides for compensation regarding injury. It requires a lower burden of proof than criminal law, given that the ultimate sanction for wrong-doing under criminal law is deprivation of a person's liberty (an experience unlikely to be enjoyed by a judge, barrister or member of parliament). Tort encompasses compensation in the form of dollars that both signals the acknowledgement of a serious wrong (often important for many victims) and goes some way, however inadequately, to right that wrong.

Removal of a judicial pension should not be used as a substitute for tort and/or criminal law. If passed the Bill potentially provides for an exceptional punishment, ie removal of the pension concurrently with a penalty such as imprisonment under criminal law and compensation under tort law. Such punishment might strike MPs as appropriate but is inappropriate as an extra-judicial remedy of a severity that would not be experienced by a Commonwealth Minister, a current/former member of the Australian Defence Force or a public servant.

Alternative

The national parliament's abhorrence of serious misconduct is best signalled through a bipartisan statement of condemnation, rather than removal of a judge's pension. Such condemnation has three functions.

It demonstrates that no one is above the law; all are subject to the justice system and that the justice system is trusted to function without political interference.

It signals that the Commonwealth parliament as the key legislature in Australia speaks on behalf of the people in decrying wrongdoing, including behaviour that for too long as been shrugged off and misogynistic or other values – regrettably evident among senior politicians in recent years – that are deplored by most Australians.

It represents a commitment on the part of MPs to be beyond reproach in their own dealings with ministerial staff, officials and entities seeking a commercial/personal advantage from those in positions of power. There is substantial research regarding community distrust of politicians and what takes place in the 'Canberra Bubble', including perceptions of egregious hypocrisy in personal relations alongside questions about conflicts of interest on the part of ministers and backbenchers. Any move to withdraw a pension will be more persuasive if the MPs who vote in favour of or abstain from the required resolution are themselves doing so from moral high ground.